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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
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JEANNE LICKS, CLERK
BY: V. Adams

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300CR20081339

Division 6

**DEFENDANT'S REPLY TO
STATE'S RESPONSE TO HIS
MOTION TO SUPPRESS
EVIDENCE AND REQUEST FOR
FRANKS HEARING**

(Oral Argument and Evidentiary
Hearing Requested)

Pursuant to A.R.S. §13-3911 *et seq.*, Rule 16.2 of the Arizona Rules of Criminal Procedure, Due Process, and the Arizona and U.S. Constitutions, Defendant Steven C. DeMocker hereby replies to the State's response to his motion to suppress from evidence at the trial in this matter all items seized by the police from his residence and office in Prescott, Arizona on July 3, 2008 pursuant to a search warrant, and to suppress the fruits obtained as a result of those unlawful searches and seizures. Mr. DeMocker submits the following Memorandum of Points and Authorities in support thereof. Mr. DeMocker

1 renews his requests that this Court hear this motion and conduct a *Franks* hearing on
2 Tuesday, November 17, 2009 as previously ordered.

3
4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 I. No Probable Cause Existed to Support the Issuance of the Search Warrant in
6 Question.

7 Rule 16.2(b), Rules of Criminal Procedure describes the procedure for proceeding
8 on a motion to suppress as follows: "... the prosecutor shall have the burden of proving,
9 by a preponderance of the evidence, the lawfulness in all respects of the acquisition of all
10 evidence which the prosecutor will use at trial. However, whenever the defense is entitled
11 under Rule 15 to discover the circumstances surrounding the taking of any evidence by
12 confession, identification or search and seizure, or defense counsel was present at the
13 taking, or the evidence was obtained pursuant to a valid search warrant, the prosecutor's
14 burden of proof shall arise only after the defendant has come forward with evidence of
15 specific circumstances which establish a *prima facie* case that the evidence taken should
16 be suppressed." Defendant's motion in fact does provide such evidence and the burden
17 now shifts to the State. Further, the State's response merely gainsays the specific
18 allegations in the motion as to the lack of probable cause, and confuses the relationship
19 between a motion to suppress and a hearing pursuant to *Franks v. Delaware*, 438 U.S.
20 154, 171-72, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).
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25 Specifically, the State seems to misunderstand the concept that a warrant can be
26 improvidently issued where the affidavit both fails to set forth probable cause and at the
27 same time contains *Franks* violations, as is the case here. In particular, the State argues
28

1 that the affidavit is sufficient in describing the probable cause to believe that Defendant's
2 personal and work computers and media storage devices contain evidence of a crime or
3 crimes committed by Defendant because "common sense" tells us so. Clearly, the law
4 requires that the affidavit describe in detail, on its face, why the affiant believes that such
5 evidence will be found and the basis for his assertions.¹ The affidavit in question here is
6 utterly devoid of such allegations. As a result, the warrant authorized the police, with no
7 actual probable cause, to dig without limits through all of Defendant's electronically
8 stored personal and business records and communications in the misguided hope that they
9 would stumble upon evidence of his guilt. A more obvious violation of the Fourth
10 Amendment is difficult to imagine. The State has not, because it cannot, identified any
11 case that actually stands for the proposition that an affidavit such as the one here can
12 support the issuance of a warrant to seize and then search computers and other electronic
13 media
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17 II. A *Franks* Hearing Will Establish that False and Misleading Statements Are
18 Contained in the Affidavit.
19

20 There is no corresponding rule that guides the procedures for a *Franks* hearing. In
21 his motion, Defendant has set forth several examples of what he believes are false and/or
22 misleading statements found within the four corners of the affidavit. Because Defendant
23 cannot fully predict what the affiant will say at the hearing, he is presently unable to say
24 that these are all the *Franks* violations in this case, and leaves the matter to the proof to
25

26
27 ¹ The Court is surely familiar with the boilerplate allegations in affidavits for search warrants in routine drug cases
28 that detail the affiant's experience and knowledge that drug dealers keep information about their crimes on such
devices. The affidavit here lacks even that basic information.

1 be adduced at the hearing. Defendant is confident, however, that when the violative
2 statements are redacted, the balance of the affidavit will fail to establish probable cause
3 for the issuance of the warrant.
4

5 For these reasons and those advanced in the motion and at the hearing thereon, all
6 evidence seized pursuant to the instant search warrant, and the fruits obtained therefrom
7 pursuant to *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441
8 (1963), should be suppressed as a result of significant Constitutional violations.
9

10 DATED this 13th day of November, 2009.

11
12 By: 

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18 **ORIGINAL** of the foregoing filed
19 this 13th day of November, 2009, with:

20 Jeanne Hicks
21 Clerk of the Court
22 Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

23 **COPIES** of the foregoing hand delivered
24 this 13th day of November, 2009, to:

25 The Hon. Thomas B. Lindberg
26 Judge of the Superior Court
27 Division Six
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Prescott, AZ 86303

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